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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants
vs.
COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants
vs.
COUNTY OF TUOLUMNE

On Appeals From the California Court of Appeal,
Fifth Appellate District

Motion to Dismiss or Affirm

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The Appellee, COUNTY OF FRESNO, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Fifth Appellate District on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

STATEMENT OF THE CASE

A. The Statutes

This appeal raises the question of the validity of certain state statutes as applied to possessory interests of United States Forest Service employees in residences owned by

the Federal Government and located in the national forests and assigned to said employees for use as single. family residences.

California Revenue and Taxation Code Section 201 requires Appellee's Assessor to assess all property in the County not exempt by law from taxation. California Constitution Article II, Section 12, provides all such property shall be assessed at its full cash value. California Constitution Article XIII, Section 1, provides that all property shall be taxed unless specifically exempt. California Revenue and Taxation Code Section 103 defines "property" as "all matters and things, real, personal and mixed, capable of private ownership. "Revenue and Taxation Code Section 104 defines real property as including "(a) possession of, claim to, ownership of, or rights to the possession of land including improvements."

Title 18 of the California Administrative Code, Section 21 (b) provides " 'Taxable Possessory Interest' means a possessory interest in non-taxable publicly owned real property, as such property is defined in Section 104 of the Revenue and Taxation Code and in taxable publicly owned real property subject to the provisions of Section 3 (a), (b) and 11, Article XIII of the (California) Constitution.

Excluded from the meaning of 'Taxable possessory interest' is any possessory interest in real property located within an area to which the United States has exclusive jurisdiction concerning taxation. Such areas are commonly referred to as enclaves."

B. The Proceedings Below

In 1967 Appellee made assessments of the individual appellant's possessory interests in the personal living quarters, single family residences, assigned to and rented by them from their employer, appellant United States of

America, in both the Sierra National Forest and Sequoia National Forests, located within the County of Fresno. The employees paid such taxes, which amounted to a total of $134.55 for the seventeen (17) employees, under protest and applied to Appellee's Board of Equalization for cancellation of the assessment and refund of the taxes paid. Their applications were duly denied, and this litigation followed. The Trial Court found in favor of Appellants, and its judgments were appealed by Appellee County to the Court of Appeal of the State of California, Fifth Appellate District. That Court at *U.S.A. v. County of Fresno* 50 CA 3d 633 reversed the Trial Court's decision, and held, as a matter of law, that appellants enjoyed taxable possessory interests in such housing, and that the Constitutional issues raised by Appellants were unfounded, and remanded the cases back to the Trial Court for further hearing on the valuation issues. Appellants then petitioned the California Supreme Court for a hearing, which was denied.

II
ARGUMENT

This case presents no substantial questions not previously decided by this Court.

Basically two questions are presented by Appellants in seeking the Court's plenary review of the decision of the State District Court of Appeal, upholding these taxes. Both questions have been previously considered and decided by the Court.

1. Whether the imposition of such possessory interest taxes against the personal property rights of government employees, somehow violates the immunity of the United States from state taxation as provided in the Supremacy Clause of the United States Constitution; and

2. Whether such tax is repugnant to the Supremacy Clause and thus unconstitutional because it discriminates against the Federal Government and its employees.

In dealing with the first question, two factors should be noted.

a. That there was absolutely no evidence offered or admitted in the trials of this case that the imposition of these taxes on the employee's right of possession and occupancy had, or could have had any adverse effect or infringement on the rights, interests or duties of the Federal Government in discharging its obligations in the National Forests.

b. That Congress has not provided for any immunity from local taxation of private interests, including that of Federal employee's personal housing, in the National Forests.

From its genesis as a state, California Courts have recognized and upheld state and local taxation of private person's possessory interests in Government, tax exempt land. *People v. Naglee* (1850) 1 Cal 232 (state license fee on foreigners working in the gold mines); *People v. Shearer* (1866) 30 Cal 645 (assessment of property interest of adverse possessor of Government land); *Kaiser v. Reid* (1947) 30 Cal 2d 610 (tax imposed against possessory interest of shipbuilder in shipyards leased from United States); *McCaslin v. DeCamp* (1967) 248 CA2d 13 (employee's housing of tax exempt entity); *Board of Supervisors v. Archer* (1971) 18 CA 3d 717 (assessment of private grazing leases on United States Forest Service land).

This Court has consistently and repeatedly held that there is no inference of immunity from state taxation, but rather that there must exist clear and persuasive proof that the imposition of such taxes, as is the case here, will result in a burden on or intereference with the activities of

the Federal Government. *Hibernia Bank v. San Francisco* (1906) 200 U S 310; *Helvering v. Mountain Producers Corporation* 303 U S 376, 386; *Graves v. New York* 306 U S 466; *Penn Dairies v. Milk Conirol Commission* 318 U S 261.

This Court has considered and upheld the propriety of State possessory interest assessments against government property in possession of a private contractor in *City of Detroit v. Murray Corporation of America* 355 U S 589 distinguishing its earlier decision in *United States v. County of Allegheny* 322 U S 174 and stating at 355 U S 495:

> "We find nothing in the Constitution which compels us to strike down these state taxes. There was no discrimination against the Federal Government, its property, or those with whom it does business. There was no crippling obstruction of any of the government's functions, no sinister effort to ham-string its power not even the slightest interference with its property. Cf *M'Cullough v. Maryland* (U S) 4 Wheat 316."

In *United States v. City of Detroit* 355 U S 466 a similar possessory interest tax was upheld, the Court again at 355 U S 471, distinguishing this case from its holding in *United States v. County of Allegheny* 322 U S 174, at 184:

> "Whether such right to possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. . . . Actual possession and custody of government property nearly always are in someone who is not himself the government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationships by way of salary, profit, or *beneficial personal use of the property may be taxed as we have held.*" (emphasis added)

The Court in *United States v. City of Detroit, supra,* p. 477, upheld the tax "imposed on a party using tax exempt property for its own 'beneficial personal use' and 'advantage.'"

The cases cited, *supra,* clearly support the decision of the State District Court of Appeal, in upholding these taxes.

The cases cited by Appellant in its Jurisdictional Statement, are easily distinguished from the case at bar, and when this is done, it seems obvious that in fact no substantial questions remain for plenary review by the Court.

In the case of *United States v. Mississippi Tax Commission* 421 U S 599, cited by Appellant, a state sales tax on sales of liquor by out of state distillers to military installations within Mississippi was held to be unconstitutional. The Court found that "post exchanges and similar facilities were instrumentalities of the United States", and the tax was actually paid by the military out of non-appropriated fund activities. In the case at bar, the tax does not fall on any instrumentality or facility of the United States.

Kern-Limerick, Inc., v. Scurlock 347 U S 110, involved a state sales tax imposed on the sale of tractors to a private contractor of the government. The Court determined that the government was in fact the purchaser, and therefor the tax could not be imposed. This decision is inapposite to the case at bar.

United States v. Richert 188 U S 432, decided in 1902, involved a state property tax on lands allotted to and personal property of the Indians, which was declared unconstitutional, based on the dependent condition of the Indians to the United States.

A somewhat similar case, reflecting the more recent feeling of the Court as to the present day business of the Indian tribes, is *Mescalero Apache Tribe v. Jones* 411 U S

145 in which a use tax levied against an off-reservation ski enterprise of the tribe, on land leased from the Federal Government by the tribe, was upheld.[1]

The California Possessory Interest tax is by reason of this analysis, not a tax upon the Federal Government, its facilities or activities, and therefore does not violate Article VI, United States Constitution.

The second question raised is whether the subject tax discriminates against the Federal Government and its employees.

Appellants assert at page 13 of their Jurisdictional Statement "that the California tax unfairly discriminates against the Federal Government because it is not imposed upon possessory interests in state forests." This statement is simply untrue. All California counties, including Appellee, assess and collect the tax on possessory interests in land and improvements owned by tax-exempt entities, including the State of California's employees, furnished housing thereon as part of their duties. This is true, even though Appellee County has no state owned forests within its boundaries. California Public Resources Code Section 4654 provides for in-lieu payments by the state to the counties in which state forest lands are situated "based only upon the value of forest lands used for purposes of continuous commercial forest productions and not upon value of forest land used for any other purposes, including any improvements on such lands"; thus possessory interests in publicly owned improvements in both the State and Na-

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1. An excellent discussion upholding the California Possessory Interest Tax as applied to lessee's interest in Indian Tribal lands, held in trust by the United States can be found in *Agua Caliente Band of Mission Indians v. Riverside County* 442 F 2d 1184. Cert. denied 405 U S 933; rehearing denied 405 U S 1033; rehearing denied 409 U S 901.

tional Forests, are treated identically for purposes of state property taxation.

The issue of whether 16 U S C 500 provides in-lieu payments of taxes from the National Forests, and thus precludes state taxation of private possessory interests therein, was squarely decided adversely to Appellant's contention by this Court in *Wilson v. Cook* 327 U S 474, which upheld an Arkansas statute which taxed severed timber cut on Forest Service lands.

The same question was most recently raised in the Ninth Circuit Court of Appeals case of *International Paper Company v. County of Siskiyou* 515 F 2d 285 in which that Court held that 16 U S C 500 must be construed with 16 U S C 480, which provides:

> "The State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

The state tax on possessory interests in the unsevered timber was upheld, and the claim of discrimination rejected.

From the above discussion it seems obvious that there remains no substantial question which requires further argument. In addition, it seems clear that the decision of the Fifth District Court of Appeal is correct. It is only fair and just that federal employees, who reside in residential housing owned by the United States located outside of federal enclaves, be assessed and pay a tax based on their personal beneficial use and occupancy thereof. Appellee provides many services to the individual Appellants in the form of safety, health, welfare and education, which are

dependent for funding through the County's real property tax. If the individual plaintiffs who are not solely federal employees but also with their families, citizens of the County and State are not required to pay their fair share of these taxes, an increased burden of taxation is transferred to the other taxpayers, in order for Appellee to provide essential services.

Paraphrasing from the language of *People v. Shearer* cited, *supra*, at page 657, "Why should (they) not contribute (their) proper share, according to the value of (their possessory interests) whatever it may be, of the taxes necessary to sustain the government which recognizes and sustains (them)?"

III

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Appeal of the State of California, Fifth Appellate District.

Respectfully submitted,

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